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ATTORNEY FOR APPELLANT:

PAUL D. STANKO
Appellate Public Defender
Crown Point, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

GARY DAMON SECREST
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

STEPHEN GASKEY, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A05-0610-CR-577
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Salvador Vasquez, Judge
Cause No. 45G01-0602-FB-21

May 23, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Stephen Gaskey, Jr. ("Gaskey") was convicted of Burglary, a Class B felony,[1] Theft, a Class D felony,[2] and Resisting Law Enforcement, a Class A misdemeanor.[3] He challenges his conviction and sentence for Burglary. We affirm.

Issues

Gaskey presents two issues for review:

I. Whether there is sufficient evidence to support his conviction of Burglary; and

II. Whether his sentence is inappropriate.

Facts and Procedural History

On February 13, 2006, Mary Zuffa ("Zuffa") returned to her Highland, Indiana home to find a vehicle parked in her driveway, with a man in the driver's seat. A second man, whom she later identified as Gaskey, came from behind the house and said to Zuffa, "We're here looking for a young lady named Thompson." (Tr. 143.) Zuffa replied that she knew no one on the block by that name. Gaskey got into the vehicle, and the driver, later identified as his brother, Tony Gaskey ("Tony"), drove away. Zuffa wrote down the license plate number of their vehicle.

Zuffa started to park her vehicle in her garage when she noticed her back door. It was open, the door frame was broken, and drywall was lying on the plastic floor runner. Zuffa summoned a neighbor who was a police officer in another town, and they contacted the

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[1] Ind. Code § 35-43-2-1.
[2] Ind. Code § 35-43-4-2.

Highland Police. Zuffa gave the responding officers the license plate number that she had obtained. A walk-through of Zuffa's house revealed that none of its contents were out of order or missing.

Later that day, Griffith Police Officer Ryan Olson saw the brothers at a convenience store and took Tony into custody. Gaskey initially eluded arrest, but was eventually apprehended. A search of the vehicle driven by Tony yielded some items reportedly stolen, but not any items belonging to Zuffa.

On February 21, 2006, Gaskey was charged with Burglary, Residential Entry,[4] Theft, and Resisting Law Enforcement. Tony was charged with the same offenses, but pleaded guilty to Burglary. On August 7, 2006, a jury convicted Gaskey as charged. Due to Double Jeopardy concerns, the trial court declined to enter a judgment of conviction upon the Residential Entry count.

On September 8, 2006, Gaskey was sentenced to fifteen years for the Class B felony Burglary, two years for the Class D felony Theft, and one year for misdemeanor Resisting Law Enforcement. The Burglary and Theft charges were to be served consecutively, but concurrent with the Resisting Law Enforcement sentence, providing for an aggregate sentence of seventeen years. Gaskey now appeals.

Discussion and Decision

I. Sufficiency of the Evidence

Gaskey contends that there is insufficient evidence to support his Burglary conviction.

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[3] Ind. Code § 35-44-3-3.

More specifically, he alleges that there is an absence of evidence on the element of "entry."

In order to obtain a conviction against Gaskey for Burglary, a Class B felony, as charged, the State was required to establish that he broke and entered the dwelling of Mary Zuffa, with the intent to commit the felony of theft therein. See Ind. Code § 35-43-2-1(1)(B)(i).

In reviewing a sufficiency of the evidence claim, this Court neither reweighs the evidence nor assesses the credibility of the witnesses. Love v. State, 761 N.E.2d 806, 810 (Ind. 2002). We look only to the evidence most favorable to the judgment and reasonable inferences drawn therefrom. Id. We must affirm a conviction if the finder-of-fact heard evidence of probative value from which it could have inferred the defendant's guilt beyond a reasonable doubt. Graham v. State, 713 N.E.2d 309, 311 (Ind. Ct. App. 1999), trans. denied.

Zuffa testified that, immediately after she saw Gaskey leave her back yard, she saw that her back door was wide open and the frame was broken. Tony testified that he drove Gaskey to Zuffa's home so that they could steal her property and that Gaskey "kicked the back door open." (Tr. 111.) Incongruously, Tony maintained that Gaskey "didn't go inside" while also affirming the truth of the Stipulated Factual Basis he submitted as part of his own guilty plea proceedings, which provided in part "On said date and at said location, Tony Gaskey and Stephen Gaskey Jr. working in agreement did knowingly and intentionally break and enter the residence/dwelling of Mary Zuffa." (State's Exhibit A.)

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[4] Ind. Code § 35-43-2-1.5.

Nevertheless, entry of the entire body is not necessary to satisfy the "entry" element of Burglary. See McCormick v. State, 178 Ind. App. 206, 209, 382 N.E.2d 172, 175 (1978). A person "enters" within the meaning of the burglary statute when he puts himself in a position to commit a felony inside the structure. Perdue v. State, 398 N.E.2d 1290, 1293 (Ind. Ct. App. 1979). From Tony's testimony that Gaskey "kicked in" the door, and Zuffa's testimony that the door was wide open and the frame broken, the jury could infer that Gaskey's foot crossed the threshold and he placed himself in a position to commit a felony inside Zuffa's residence, thus gaining "entry." There is sufficient evidence to support Gaskey's conviction for Burglary.

II. Appropriateness of Sentence

Next, Gaskey requests our examination of the relevant evidence pursuant to Indiana Appellate Rule 7(B), which provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." The trial court found Gaskey's criminal history (and circumstances derivative thereof) to be aggravating.[5] Gaskey now claims that his criminal history was accorded too much sentencing weight and that the ten-year advisory sentence for a Class B felony is the appropriate sentence. See Ind. Code § 35-50-2-5.

In Morgan v. State, 829 N.E.2d 12, 15 (Ind. 2005), the Indiana Supreme Court

[5] Although various panels of this Court have disagreed as to whether or not the trial court must make a sentencing statement, it has been universally recognized that such statements are very helpful to this court in

confronted the issue of whether a defendant's criminal record, standing alone, is a sufficient aggravator to support any enhancement above the presumptive term. In addressing this issue, the Court recognized that "the question of whether the sentence should be enhanced and to what extent turns on the weight of an individual's criminal history." Id. Such "weight is measured by the number of prior convictions and their seriousness, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability." Id. While acknowledging that, in many instances, "a single aggravator is sufficient to support an enhanced sentence," the Morgan Court cautioned sentencing and appellate judges to think about the appropriate weight to give a history of prior convictions. Id. The Morgan court noted that the defendant's prior Class B conviction for delivering a controlled substance was certainly worthy of some weight because of its similarity and proximity to the offense at issue, i.e., possession of methamphetamine as a Class A felony. Id. at 16. However, in light of the five mitigating factors found by the trial court, the Morgan Court determined that the defendant's criminal record, standing on its own, would not support the imposition of the enhanced sentence. Id. Ultimately, after determining that two of the four aggravators used to enhance the defendant's sentence were improper and concluding that the aggravating and mitigating circumstances were in equipoise, the Court directed the trial court to revise the sentence at issue to the presumptive term. Id. at 18.

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determining the appropriateness of a sentence under Indiana Appellate Rule 7(B). See Gibson v. State, 856 N.E.2d 142, 146-47 (Ind. Ct. App. 2006).

Gaskey presented no evidence of mitigating circumstances. With respect to his criminal history, he had three juvenile adjudications and he was convicted of six counts of Burglary between 1985 and 1996. On the same day that he committed the offense against Zuffa, Gaskey's vehicle contained property reported as stolen by two other victims. Numerous prior efforts to rehabilitate Gaskey had not deterred him from taking the property of others. The history of multiple offenses involving burglary and theft is worthy of sentencing weight. Gaskey has not persuaded us that the five-year enhancement of the advisory sentence for a Class B felony is inappropriate.

Conclusion

There is sufficient evidence to support Gaskey's conviction for Burglary, and his sentence is not inappropriate.

Affirmed.

SHARPNACK, J., and MAY, J., concur.